

APPEAL NO. 022104  
FILED OCTOBER 9, 2002

This appeal arises pursuant to the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq.* (1989 Act). A contested case hearing (CCH) was held on July 17, 2002. The hearing officer determined that the respondent (claimant) is entitled to temporary income benefits (TIBs) in the amount of \$97.79 per week for the period from March 27, 2000, to September 24, 2000, and \$234.97 per week for the period from September 25, 2000, to December 31, 2000. The appellant (carrier) appeals the determination on evidentiary and legal grounds. The claimant urges affirmance.

DECISION

Affirmed.

The parties stipulated that the claimant sustained a compensable injury and has been unable to work from March 27, 2000, through the date of the hearing. The parties further stipulated that the claimant received weekly payments from his employer in the amount of \$918.16 from March 27, 2000, to September 24, 2000, and \$395.05 from September 25, 2000, to December 31, 2000. It is undisputed that the carrier paid the claimant TIBs in the amount of \$229.00 per week between September 25, 2000, and December 31, 2000.

At issue was whether the employer's payments constituted a salary continuation, as asserted by the claimant, or an initiation of workers' compensation benefits by the employer plus salary supplementation,<sup>1</sup> as asserted by the carrier. This was essentially a question of fact for the hearing officer to resolve. See Texas Workers' Compensation Commission Appeal No. 970019, decided February 20, 1997. The hearing officer is the sole judge of the weight and credibility of the evidence (Section 410.165(a)) and, as the trier of fact, resolves the conflicts and inconsistencies in the evidence including the medical evidence (Texas Employers Insurance Association v. Campos, 666 S.W.2d 286

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<sup>1</sup> Section 408.003 provides, in pertinent part:

- (a) After an injury, an employer may:
  - (1) initiate benefit payments, including medical benefits; or
  - (2) on the written request or agreement of the employee, supplement income benefits paid by the insurance carrier by an amount that does not exceed the amount computed by subtracting the amount of the income benefit payments from the employee's net preinjury wages.
- (b) If an injury is found to be compensable and an insurance carrier initiates compensation, the insurance carrier shall reimburse the employer for the amount of benefits paid by the employer to which the employee was entitled under this subtitle.
- (c) The employer shall notify the commission and the insurance carrier on forms prescribed by the commission of the initiation of and amount of payments made under this section.

(Tex. App.-Houston [14th Dist.] 1984, no writ)). The hearing officer reviewed the evidence and found that the employer's payments were intended as salary continuation pursuant to a collective bargaining agreement, noting that the employer did not inform the Texas Workers' Compensation Commission (Commission) or carrier of its intent to initiate workers' compensation benefits as required by section 408.003(c).<sup>2</sup> The hearing officer's determination is not so against the great weight and preponderance of the evidence as to be clearly wrong or manifestly unjust. Cain v. Bain, 709 S.W.2d 175, 176 (Tex. 1986).

The carrier contends that it was error for the hearing officer to rely on the absence of a TWCC-2 in reaching her decision, arguing that the presence or absence of such notice is not relevant to the nature of the employer's payments but pertains only to the employer's right to reimbursement. The carrier cites language in Appeal No. 970019 in support of its position. Like the present case, Appeal No. 970019 involved a determination of the nature of post-injury payments made by an employer to an injured worker. In deciding that the employer's payments included an initiation of workers' compensation benefits, the Appeals Panel stated, "Whether the employer has waived its right to claim a reimbursement from the carrier [by failing to comply with the notice requirements of Section 408.003] does not determine the character of the monies paid." Contrary to the carrier's position, such language does not stand for the proposition that the filing of a TWCC-2 is irrelevant or should not be considered in deciding the nature of monies paid by the employer. Rather, the cited language intends to convey the point that the hearing officer is not constrained to consider solely the TWCC-2 in reaching her decision. As was also stated in the decision, a determination regarding the nature of the employer's payments may be based upon the circumstances surrounding such payments.

Next, the carrier asserts that the hearing officer erred in following our decision in Texas Workers' Compensation Commission Appeal No. 013125-S, decided February 13, 2002, which presented the same issue under similar facts. The carrier takes issue with our statement in the decision that "only the carrier can pay TIBs," arguing that such statement is contrary to the provisions of section 408.003(a) and caused an erroneous decision in this case. In Appeal No. 013125-S, the Appeals Panel rendered a decision that the payments made by the employer did not include an initiation of TIBs, noting the absence of a TWCC-2 and any other evidence of an intent by the employer to initiate workers' compensation benefits. In responding to an assertion that the claimant, nonetheless, was on notice that TIBs were being paid by the employer, we attempted to clarify that while carrier payments are by definition TIBs, payments from an employer may not be so construed in the absence of evidence to that effect. To be clear, our decision in Appeal No. 013125-S does not hold that an employer cannot initiate workers' compensation benefits. Upon review of the decision in this case, we are satisfied that the hearing officer's determination was not the result of an erroneous application of the law but was based upon the evidence presented. As stated above, we cannot conclude that the hearing officer's determination is so against the great

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<sup>2</sup> The Commission prescribed form under Section 408.003(c) is the Employer's Report for Reimbursement of Voluntary Payments (TWCC-2).

weight and preponderance of the evidence as to be clearly wrong or manifestly unjust. Cain, supra.

The carrier requests reversal of the hearing officer's determination that the claimant is entitled to additional TIBs, asserting that the determination is based upon an illegitimate rulemaking. Specifically, the carrier argues that Tex. W.C. Comm'n, 28 TEX. ADMIN. CODE § 129.2(c)(6) (Rule 129.2(c)(6)),<sup>3</sup> regarding post-injury earnings (PIE) and entitlement to TIBs, is in conflict with sections 408.003 and 408.105<sup>4</sup> of the 1989 Act, to the extent the rule requires the employer's payments in this case to be counted as PIE rather than be viewed as payments "in place of" TIBs. We have held that questions regarding the validity of Commission rules are matters for the courts to consider. Texas Workers Compensation Commission Appeal No. 001607, decided August 21, 2000. Accordingly, we decline to address this matter on appeal.

Finally, the carrier asserts that the claimant is not owed additional TIBs because the employer's payments were made, in part, free of tax withholdings, thus resulting in no lost wages. We note that the carrier did not raise this argument at the CCH. It is well-settled that the Appeals Panel is limited to issues developed below and that we will not consider an argument raised for the first time on appeal. Texas Workers' Compensation Commission Appeal No. 011288, decided July 19, 2001.

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<sup>3</sup> Rule 129.2(c)(6) provides, "PIE shall include, but not be limited to, the documented weekly amount of any monies paid to the employee by the employer as salary continuation based on: (A) a contractual obligation between the employer and the employee including through a collective bargaining agreement; (B) an employer policy; or (C) a written agreement with the employee.

<sup>4</sup> Section 408.105(a) provides, in pertinent part, "In lieu of payment of temporary income benefits under this subchapter, an employer may continue to pay the salary of an employee who sustains a compensable injury under a contractual obligation between the employer and employee, such as a collective bargaining agreement, written agreement, or policy.

The decision and order of the hearing officer are affirmed.

The true corporate name of the insurance carrier is **PACIFIC EMPLOYERS INSURANCE COMPANY** and the name and address of its registered agent for service of process is

**ROBIN M. MOUNTAIN  
6600 CAMPUS CIRCLE DRIVE EAST, SUITE 300  
IRVING, TEXAS 75063.**

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Gary L. Kilgore  
Appeals Judge

CONCUR:

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Elaine M. Chaney  
Appeals Judge

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Philip F. O'Neill  
Appeals Judge